

COURT OF COMMON PLEAS
STATE OF DELAWARE
WILMINGTON, DELAWARE 19801

JOHN K. WELCH
JUDGE

March 12, 2010

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Re: *State of Delaware v. Russell W. Stewart*
Case No.: 0904016108

Date Submitted: March 1, 2010
Date Decided: March 12, 2010

MEMORANDUM OPINION

Dear Counsel:

On Monday, March 1, 2010 a hearing was held in the Court of Common Pleas, New Castle County, State of Delaware on Russell W. Stewart's ("Defendant") Motion to Suppress filed pursuant to Court of Common Pleas Criminal Rule 12. Defendant alleges in his motion, *inter alia*, that any evidence offered by the State should be suppressed because the arresting officer did not have a reasonable and articulable suspicion "that defendant had committed, was committing, or was about to commit an offense." (Motion, ¶ 2(a)).

The Defendant was charged by Information filed with the Criminal Clerk, with one count of Driving Under the Influence of Alcohol on April 19, 2009, New Castle County at 412 North 6th Street in violation of 21 Del. C. §4177(a).

This is the Court's Final Decision and Order on Defendant's Motion to Suppress. For the following reasons the Court finds there was no reasonable articulable suspicion to order Defendant out of the vehicle and detain him or arrest defendant for a violation of 21 Del. C.§4177(a). Therefore, the Court **GRANTS** Defendant's Motion to Suppress.

I. THE FACTS

Trooper Robert Downer ("Officer Downer"), of the Delaware State Police Troop 9 testified at the Suppression Hearing. Officer Downer stated he was responding to a call directing him to the Sunoco gas station located at 412 North 6th Street, Odessa, Delaware. A call was placed from a Sunoco employee to RECOM, and handled by a dispatcher. RECOM relayed the call to Officer Downer. The subject-matter of the call was... "[i]n reference to a man sleeping in a vehicle."

Once Officer Downer arrived on scene at approximately 7:50 p.m., he approached the Sunoco building. As he reached for the door handle, he noticed a gray Jeep Liberty parked and running, one space from the front door. The passenger in the vehicle made eye-contact with Officer Downer as he simultaneously noticed the passenger drinking from a beer can. The passenger noticed Officer Downer and attempted to conceal his alcoholic beverage. Officer Downer testified his attention was then drawn to the driver who was "slumped over...kind of nodding off to sleep; he was trying to open his eyes but couldn't." The driver was identified at the Suppression Hearing as the Defendant, Russell W. Stewart.

Officer Downer stated at the Hearing that he approached the vehicle out of concern for the driver. The passenger-window of the car was already down, and as he approached the vehicle from the driver's passenger side window he detected a strong odor of alcohol emanating from the car. At this point, Officer Downer asked Defendant if he was okay, to which he

responded “Yes.” This conversation was recounted at the Hearing as Officer Downer testified, “I said are you okay? He says yes, and his voice was very...sounded slurred, sleepy. I asked Mr. Stewart to step out of the vehicle.” At the time of ordering Defendant from the vehicle, Officer Downer was still physically located on the passenger side of the vehicle.

Officer Downer had noticed that Defendant’s eyes were bloodshot, watery and glassy. He ordered Defendant out of the vehicle based on this observation in conjunction with the presence of the vehicle alcohol odor. Defendant staggered while exiting the vehicle. Officer Downer now noticed the odor of alcohol on the Defendant’s person. The remaining facts leading up to Defendant’s arrest were not recounted at this stage of the Suppression Hearing.

On cross-examination, Officer Downer candidly stated at the suppression hearing that he had no indication that Defendant was going to drive nor was he made aware by any inquiries of his own whether Defendant already had driven while intoxicated. He stated he was simply concerned with the Defendant’s well-being, but could not recite any offense he had committed:

DEFENSE COUNSEL: At the time you asked Mr. Stewart to exit the vehicle had he either committed an offense, indicated to you that he was in the process of committing an offense, or was about to commit an offense?

OFFICER: I believed he had committed an offense.

DEFENSE COUNSEL: What was that?

OFFICER: He appears to me to have difficulty keeping his eyes open, the passenger was actively drinking, there are empty beer cans inside the vehicle some of which are behind the driver’s seat, his eyes, his slurred speech. All of those factors to me indicated that he had been drinking...it indicated that something wasn’t right.

DEFENSE COUNSEL: Tell me what the offense is. Sleeping in a running vehicle in a parking lot?

OFFICER: Sleeping in a running vehicle. Again I have odor of alcohol coming from the vehicle, I contact him to make sure he is okay, because honestly I don't know at this point.

Officer Downer could not remember if he asked the Defendant for his license, registration, where he was going, or if he had any alcohol prior to his instruction to exit the vehicle.¹ Officer Downer was asked whether he was familiar with the “community care doctrine”² to which he stated he had no knowledge of this doctrine. Therefore, this doctrine serves no significance in the instant suppression hearing.

II. THE LAW

The argument expressed in Defendant's Motion to Suppress was that there was no reasonable and articulate suspicion for Officer Downer to order Defendant out of the vehicle. Defense counsel argued at the suppression hearing that the Officer did not have authority to detain defendant because he thought there was no crime suspected about to be committed, or had been committed by the defendant. See, 10 Del. C. §1902. The core of the defense being that sleepiness/sleeping in a car is not necessarily by itself a crime. The issue before the Court is whether Officer Downer had reasonable articulable suspicion prior to asking Defendant to get out of the vehicle.

The Fourth Amendment of the Delaware and the United States Constitutions protects an individual's right to be free from searches and seizures. U.S. Const. amend. IV; Del. Const. Art. I §6. Accordingly, a police officer must justify any seizure of a citizen, with the level of

¹DEFENSE: “At any time before you asked him to exit the vehicle, did you ask for identification?”

OFFICER: “I don't remember. I honestly don't remember.”

² An officer's seizure of an individual may be warranted where there are, “objective, specific and articulable facts from which an experienced officer [suspects] a citizen is in need of help or is in peril.” See, e.g., Williams v. State, 962 A.2d 210 (Del. 2008); See also, State v. Munzer, Del. Com. Pl., No. 0805019677, 2009 WL 206088, Welch, J. (January 9, 2009) (where defense argued that the community care doctrine should not apply because the testifying officer was unfamiliar with the doctrine and didn't testify that there was a medical emergency or peril requiring police assistance).

justification varying depending on the magnitude of the intrusion. State v. Arterbridge, Del. Super. Ct., Cr. A. Nos. 94-08-0845 and 94-08-0846, 1995 WL 790965, Barron, J. (December 7, 1995); See, U.S. Hernandez, 854 F.2d 295, 297 (8th Cir. 1988); See also, State v. Dinan, Del. Com. Pl., Cr. A. Nos. MN98-07-0111 and MN 98-07-0112, 1998 WL 1543573, Welch, J. (October 15, 1998) (where this Court applied this standard to a motor vehicle stop by a police officer).

Reasonable and articulable suspicion is required for a seizure of a citizen. A police officer may detain an individual for investigatory purposes for a limited scope, if supported by reasonable and articulable suspicion of criminal activity. Jones v. State, 745 A.2d 856 (Del. 1999) (citing Terry v. Ohio, 392 U.S. 1 (1968)). A determination of reasonable and articulable suspicion must be evaluated by the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer under the same or similar circumstances, combining objective facts with the officer's subjective interpretation of them. Id. The Delaware Supreme Court defines reasonable and articulable suspicion as an officer's ability to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. Id. In the absence of reasonable and articulable suspicion of wrongdoing, detention is not authorized. State v. Munzer, Del. Com. Pl., No. 0805019677, 2008 WL 5160105, Welch, J. (December 9, 2008); see, e.g., State v. McKay, Del. Com. Pl., No. 0705027402, 2008 WL 868109, Welch, J. (April 2, 2008) (where the Court held there was no reasonable suspicion where the officer viewed the defendant's car speeding in the opposite direction but there were no radar logs to substantiate this allegation); State v. Jacobs, Del. Com. Pl., No. 0310022057, 2004 WL 2378814 (October 6, 2004) (no reasonable suspicion where officer alleged defendant's vehicle had non-working brake lights and defendant failed to signal,

but both claims were omitted from the police report); contra, State v. Lahman, Del. Super. Ct., Cr. No. 94-10011118, 1996 WL 190034, Cooch, J. (January 31, 1996) (officer's observation of a beer can on the roof of the car and a child on driver's lap constituted reasonable suspicion for stop of the vehicle); State v. Dinan, Del. Com. Pl., Cr. A. Nos. MN98-07-0111 and MN 98-07-0112, 1998 WL 1543573, Welch, J. (October 15, 1998) (where reasonable suspicion was found for motor vehicle violations, including here where defendant's car crossed the double-yellow line ten times during officer observation).

There are three categories of police-citizen encounters. Hernandez, 854 F.2d at 297. First, the least intrusive encounter occurs when a police officer simply approaches an individual and asks him or her to answer questions. This type of police-citizen confrontation does not constitute a seizure. Robertson v. State, 596 A.2d 1345, 1351 (1991) (citing Florida v. Bostick, 501 U.S. 429, 434 (1991)). Second, a limited intrusion occurs when a police officer restrains an individual for a short period of time. This Terry stop encounter constitutes a seizure and requires that the officer have an "articulable suspicion" that the person has committed or is about to commit a crime. This is also codified under Delaware law, 11 Del. C. §1902(a), which reads, "a peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination." Third, the most intrusive encounter occurs when a police officer actually arrests a person for commission of a crime. Only "probable cause" justifies a full-scale arrest. Hernandez, 854 F.2d at 297.

The stop of an automobile triggers the second category of a police-citizen encounter which requires that the officer have "reasonable articulable suspicion" for the seizure. Delaware v. Prouse, 440 U.S. 648 (1979). A seizure is quantified when the police encounter "convey[s] to

a reasonable person that he or she is not free to leave.” U.S. v. Mendenhall, 446 U.S. 544, 545 (1980); Florida v. Royer, 460 U.S. 491, 502 (1983). “The Court must make this decision objectively by viewing the totality of circumstances surrounding the incident at that time.” State v. Munzer, Del. Com. Pl., No. 0805019677, 2008 WL 5160105, Welch, J. (December 9, 2008) (quoting Mendenhall, 446 U.S. at 545).

The legal standard for the stop is the crux of this case. The quantum of evidence required for reasonable articulable suspicion is less than that of probable cause. Downs v. State, 570 A.2d 1142, 1145 (Del. 1990). The former requires that an objective standard be met: “would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?” Terry, 392 U.S. at 22. “In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Id. at 21.

In order for the Court to establish whether reasonable suspicion exists, all of the circumstances surrounding the search or seizure must be scrutinized. The Delaware Supreme Court has declared “that the determination of reasonable suspicion must be evaluated in the context of the totality of the circumstances as viewed from the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with an officer’s subjective interpretation of those facts.” State v. Bloomingdale, Del. Com. Pl., Cr. A. No. 99-09-3799, 2000 WL 33653438, Smalls, C.J. (July 7, 2000) (quoting Jones, 745 A.2d at 861 (Del. 1999)).

III. DISCUSSION

The legal issue pending before the Court is whether there was a reasonable articulable suspicion to justify Defendant's seizure. The Court must consider the totality of the circumstances by examining the officer's ability to point to specific and articulable facts, taken with rational inferences that could reasonably warrant the intrusion by Officer Downer. For the reasons stated below, this Court concludes that there was no reasonable articulable suspicion to warrant the seizure of the Defendant.

IV. CONCLUSION and ORDER

The State argued at the Hearing that Officer Downer had acted in accordance with 11 Del. C. §1902 in detaining Defendant because he had reasonable suspicion to conclude that a crime had already been committed or was about to be committed. The State argued that when looking at the totality of the circumstances which included the facts that the vehicle was running and Defendant was in the driver's seat, it could be determined that the vehicle could easily be driven away thus constituting a crime. The prosecutor never explicitly mentioned any specific Title 21 "crime" to which she was referring.

The defense argued in opposition that 11 Del. C. §1902 did not apply, *inter alia*, because Officer Downer failed to ask for Defendant's name, address, business abroad and destination as required by the statute. The defense further argues that no crime had been committed, was in the process of being committed, or was about to be committed. The argument points to the fact that there was no individual odor of alcohol, only an odor coming from the vehicle, implying the odor was caused to the non-defendant passenger's consumption. The odor of alcohol was only specifically attributed to the defendant *after* he exited his vehicle. The defense expressed the fact that the call from Sunoco was not for a person who was drunk in a vehicle or that someone was driving under the influence, but instead was for someone sleeping in the car. Furthermore, the

defense argues that the reason Officer Downer responded to the call was for a sleeping person, not a crime involving alcohol.

In the end, the defense's argument hinges on the allegation that Officer Downer exercised control over the Defendant before he had any authority to do so. In closing, counsel for the defense opined that an admission of alcohol consumption or the odor of alcohol (if it was attributed to the Defendant specifically) could not be explained away, but the situation in the instant case is different in that the officer, "jump[ed] the gun" before confirming such facts.

This Court agrees with the defense that this instance does not involve a §1902 detention as no violation of a statute (an offense) was observed by Officer Downer. The Court also finds it hard to believe that Officer Downer could determine from Defendant's utterance of the word "yes" that his speech was slurred in a way that would raise reasonable suspicion that he was intoxicated.³ This Court finds it persuasive that if Defendant had indeed been sleeping or fighting sleep that his speech would not be clear and crisp upon a one-word response to a question.

Further examining the instant case under the totality of circumstances test, the fact Officer Downer ordered Defendant out of the vehicle from the passenger side of the vehicle indicates he could only realistically attribute the odor of alcohol to the vehicle as a whole and not specifically to the Defendant. The Officer testified that he could not determine whether any of the beer cans he spotted had been recently consumed, since there was no sweating of the cans or spillage. If arguendo, Officer Downer had asked if the Defendant had been drinking or where he was coming from, and at this time the officer determined Defendant was intoxicated, he *may*

³ Officer Downer testified when he asked Stewart if he was okay, that Stewart responded "yes" in a way the Officer could tell he was intoxicated. When asked on cross-examination whether there was more to the conversation, Downer stated there was a "a little more" but that he could not recall any specifics.

have been able to detain him as this *may* amount to reasonable articulable suspicion. 10 Del. C. §1902.

Ultimately, in a situation where a suspect is acting in accordance with the law, it is unreasonable under the 4th amendment of the Delaware Constitution to detain him or her in a way that would constitute a seizure. This case is akin to the situation argued before this Court in State v. Munzer, Del. Com. Pl., No. 0805019677, 2008 WL 5160105, Welch, J. (December 9, 2008). In Munzer, a police officer ordered Mark J. Munzer (the defendant) out of his vehicle because “he wanted to know ‘what was going on’ without reference to any motor vehicle violation.” Id. at 5. Munzer was stopped after the officer witnessed him turn off his car engine while waiting for a train to pass. Id. at 2. Although the State argued that Munzer had obstructed traffic in violation of 21 Del. C. §4130 and failed to maintain a minimum speed in violation of 21 Del. C. §4171, the officer’s proffer to the Court was without reference of any actual violation of Title 21. Id. at 2, 4. The Court concluded in Munzer the officer did not have reasonable articulable suspicion that the defendant had committed or was about to commit a crime. Id. at 5.

This Court must grant Defendant’s Motion to Suppress. “In a Motion to Suppress the State bears the burden of establishing the challenged search or seizure comported with the rights guaranteed by the United States Constitution, the Delaware Constitution and Delaware statutory law. The burden of proof on a Motion to Suppress is proof by a preponderance of the evidence.” Hunter v. State, 783 A.2d 558 (Del. 2001) (Mem. Op. at 5-6); State v. Bien-Aime, Del. Super. Ct., Cr. A. No. IK92-08-321, 1993 WL 138719, Toliver, J. (March 17, 1993) (Mem. Op.) (citations omitted). The State has not met this burden today. Applying the totality of circumstances test set forth in the case law above, the Court finds that Officer Downer did not

have a reasonable articulable suspicion the Defendant had committed, was committing or was about to commit a crime. Defendant's seizure was thus unlawful.

OPINION AND ORDER

The Court therefore **GRANTS** Defendant's Motion to Suppress.

IT IS SO ORDERED this 12th day of March, 2010.

John K. Welch
Judge

cc: Diane Healy, Clerk of the Court
CCP, Criminal Division